

Appeal from decision of Montana State Office, Bureau of Land Management, rejecting simultaneous oil and gas lease application M 53834.

Affirmed.

1. Notice: Generally -- Oil and Gas Leases: Rentals -- Rules of Practice: Generally

Where, pursuant to 43 CFR 3112.4-1, BLM sends notice by certified mail to a simultaneous oil and gas lease applicant at his record address that he must execute and return the enclosed lease form with the rental, and the delivery stub shows the date the first attempted delivery was made but has no date for the second attempted delivery, and the Postal Service held the BLM notice for the required time, negligence by the Postal Service is not established; appellant was constructively served and thus had notice, and as he failed to pay the rental within the required 30 days, BLM correctly rejected appellant's oil and gas lease application.

APPEARANCES: Ruth Brammer Johnson, Esq., Denver, Colorado, for appellant.

OPINION BY ADMINISTRATIVE JUDGE LEWIS

William F. Heins III appeals from a decision of the Montana State Office, Bureau of Land Management (BLM), dated August 2, 1982, rejecting his simultaneous oil and gas lease application M 53834 for failure to file the offer and submit the first year's rental as required by 43 CFR 3112.4-1(a).

Appellant's application received first priority for parcel MT 99 in the November 1981 drawing. BLM sent a notice to appellant dated May 24, 1982, by certified mail, requiring appellant to pay the first year's rental within 30 days of receipt of the notice and to sign and date the lease forms. Attached to the envelope was a delivery stub for claim check No. 351512 which indicated that the first delivery notice or receipt was delivered to appellant on May 31. The spaces on the stub for the second notice date and the date the

envelope was returned to BLM were blank. On June 18, 1982, the Postal Service returned the envelope containing the notice to BLM marked "Unclaimed." BLM's stamp on the envelope shows that BLM received it on June 24, 1982. On August 19, 1982, appellant received a decision from BLM that the application was rejected for nonpayment of rental. There is no evidence that appellant ever paid the rental.

On appeal appellant contends that an application for an oil and gas lease offer should not be rejected for failure to execute the lease and pay the rental where the Postal Service failed to follow the correct procedure in delivering a certified return receipt envelope containing BLM's notice and where a delivery notice or a receipt for the envelope was never received by appellant. Appellant refers to the delivery stub on the envelope which reveals that the first attempted delivery was made on May 31. He points out that the stub indicates that no second notice was sent and does not indicate the date the notice was returned to BLM.

Appellant argues that the Postal Service Domestic Mail Manual (DMM), section 912.55, requires two attempted deliveries and a period of 15 days before a letter is returned. He also argues that due to the errors of the Postal Service, the notice should not be considered to have been "received" by him pursuant to 43 CFR 1810.2(b), which provides that a person is considered to have received a communication "if delivery is attempted to his address of record regardless of whether it was, in fact, received by him." Appellant contends that 43 CFR 1810.2(b) only applies in cases where the Postal Service substantiates one of three situations: The addressee moved without leaving a forwarding address, delivery was refused, or the specified address did not exist, and that none of those circumstances is the situation before us.

[1] Departmental regulation 43 CFR 3112.4-1(a) provides in part:

§ 3112.4-1 The lease offer and payment of first year's rental.

(a) The lease agreement, consisting of a lease form approved by the Director, Bureau of Land Management, and stipulations included on the posted list or later determined to be necessary, shall be forwarded to the first qualified applicant for signing, together with a request for payment of the first year's rental. * * * The executed lease agreement and the applicant's rental payment shall be filed in the proper Bureau of Land Management office within 30 days from the date of the receipt of notice. Timely receipt of the properly signed lease and rental constitutes the applicant's offer to lease.

The Board has affirmed the rejection of simultaneously filed oil and gas lease offers where all the requirements of 43 CFR 3112.4-1(a) have not been met. See Paul H. Landis, 61 IBLA 244 (1982); Keith B. Livermore, 59 IBLA 232 (1981).

The issue in this case, however, is whether the circumstances of the delivery of the certified letter constitute constructive service and whether appellant received notice pursuant to the requirements of 43 CFR 3112.4-1(a). 43 CFR 1810.2(b) states:

(b) Where the authorized officer uses the mails to send a notice or other communication to any person entitled to such a communication under the regulations of this chapter, that person will be deemed to have received the communication if it was delivered to his last address of record in the appropriate office of the Bureau of Land Management, regardless of whether it was in fact received by him. An offer of delivery which cannot be consummated at such last address of record because the addressee had moved therefrom without leaving a forwarding address or because delivery was refused or because no such address exists will meet the requirements of this section where the attempt to deliver is substantiated by post office authorities.

In John Oakason, 13 IBLA 99 (1973), the Board characterized 43 CFR 1810.2(b) as follows:

That regulation generally provides for constructive notice by mailing to a person's address of record. It has been long established under the Department's rules of practice that transmission by registered or certified mail of a decision to the address of record of an applicant and the unsuccessful attempt by the Post Office to deliver the document at that address constitutes constructive service. Cornell Shelton, A-26441 (October 17, 1952).

13 IBLA at 102. The Board has found that the rule is reasonable and necessary to expeditious administration of BLM's business because the conduct of Government business cannot be compelled to wait the pleasure or convenience of those persons who seek to deal with it. Charles M. Brady, 33 IBLA 375, 377-78 (1978), quoting Jack Koegel, 30 IBLA 143, 144 (1977); Robert D. Nininger, 16 IBLA 200 (1974), aff'd, Nininger v. Morton, Civ. No. 74-1246 (D.D.C. Mar. 25, 1975).

The second sentence of the regulation delineates the instances in which an attempt to deliver will constitute delivery where such attempt is substantiated by the Postal Service. The primary intent of this provision is to protect BLM when the failure to realize delivery is the fault of the person receiving delivery. Jack R. Coombs, 28 IBLA 53, 56 (1976). But fault on the part of the BLM client is not essential to a finding of constructive service. In addressing arguments similar to appellant's in John Oakason, supra at 104, the Board found that

although the Post Office stamp may have separate check offs for "refused" and "unclaimed," that does not restrict the meaning of this Department's regulations. It is within the ambit of meaning of regulations 43 CFR 1810.2(b) and 43 CFR 4.401(c)(2) referring to mail that is "refused" to encompass mail which is undeliverable

because it is "unclaimed" by the addressee. Mail which has been returned as "unclaimed" has been considered as validly constructively served within the meaning of the Department's rules. E.g., Duncan Miller, A-31054 (August 21, 1969).

Constructive service has been held to take effect at the time of return by the Postal Service of an undelivered certified letter to BLM. Betty Alexander, 53 IBLA 139 (1981); see also 43 CFR 4.401(c)(3). ^{1/} There is an exception to this constructive service rule, however. The Board has held that where the negligence of the Postal Service, acting as agent for BLM for transmitting notice, has precluded effective actual notice, the Board will not consider notice to have been constructively served pursuant to 43 CFR 1810.2(b). Joan L. Harris, 37 IBLA 96 (1978); Jack R. Coombs, *supra*. In summary, constructive service occurs whenever a registered or certified document is returned to BLM, regardless of the actions of the intended recipient, except where the negligence of the Postal Service, BLM's agent, has precluded effective actual notice.

^{1/} The Board's reference to 43 CFR 4.401(c) in cases involving questions of constructive notice merits comment. The regulation is found in 43 CFR Subpart E -- Special Rules applicable to Public Land Hearings and Appeals, and states:

"(c) Service of documents. (1) Wherever the regulations in this subpart require that a copy of a document be served upon a person, service may be made by delivering the copy personally to him or by sending the document by registered or certified mail, return receipt requested, to his address of record in the Bureau.

"(2) In any case service may be proved by an acknowledgement of service signed by the person to be served. Personal service may be proved by a written statement of the person who made such service. Service by registered or certified mail may be proved by a post-office return receipt showing that the document was delivered at the person's record address or showing that the document could not be delivered to such person at his record address because he had moved therefrom without leaving a forwarding address or because delivery was refused at that address or because no such address exists. Proof of service of a copy of a document should be filed in the same office in which the document is filed except that proof of service of a notice of appeal should be filed in the office of the officer to whom the appeal is made, if the proof of service is filed later than the notice of appeal.

"(3) A document will be considered to have been served at the time of personal service, of delivery of a registered or certified letter, or of the return by post office of an undelivered registered or certified letter." (Emphasis added.)

By its terms, this regulation governs service of documents relating to hearings and appeals and it has been applied in such situations. See, e.g., James W. Heyer, 2 IBLA 318 (1971); United States v. Asbestos Development Corp., 73 I.D. 82 (1966). Nevertheless, the Board has also referred to it in decisions and notices of the BLM without elaboration where questions of constructive notice are at issue. See, e.g., Betty Alexander, *supra*; Lite Sabin, 51 IBLA 226, 87 I.D. 610 (1980); Charles M. Brady, 33 IBLA 375 (1978); John Oakason, *supra*; Beryl Shurtz, 4 IBLA 66 (1971).

In effect, appellant argues that the Postal Service was negligent and did not follow its established procedures, as evidenced by the claim check on the BLM envelope, and thus actual notice was precluded.

The DMM directs delivery of certified mail as follows:

912.5 Delivery

.51 Procedure. Certified mail for delivery by carriers will be taken out on the first trip after it is received, unless the addressee has requested that the postmaster hold his mail at the post office. Certified mail not restricted in delivery will be delivered to the addressee or his authorized representative. * * *

* * * * *

.55 Notice of Arrival. The carrier will leave a notice of arrival on Form 3849-A, Delivery Notice or Receipt, if he cannot deliver the certified article for any reason. The article will be brought back to the post office and held for the addressee. If the article is not called for within 5 days, a second notice on Form 3849-B, Delivery Reminder or Receipt, will be issued. If the article is not called for or its redelivery requested it will be returned at the expiration of the period stated by the sender, or after 15 days if no period is stated.

.56 Delivery at Post Office

Hold certified mail at a place convenient for the public to call if addressed for box or general delivery or for firm callers, of [sic] if a Form 3849-A or 3849-B had been left for addressee to call. [Emphasis in italics in original.]

In response to an inquiry from the Board, the Postmaster of the Conroe, Texas, Post Office explained that the first notice of delivery of certified letter No. 01021 for P.O. Box 1017 was issued on May 31, 1982. The postmaster made the following statement regarding a second notice:

Our procedures for handling certified mail state a second notice is to be issued five (5) days later if the certified article has not been delivered. I assume this procedure was followed. Since the date is not indicated in the second notice space on Label 3849-A of the mailing piece, I cannot say for certain a second notice was issued. Of course, it is possible a second notice was issued and not indicated on the mailing piece.

The postmaster added that the records of the Postal Service indicate that certified No. 01021 was returned (mailed) to sender on June 18, 1982.

In Michele M. Dawursk, 71 IBLA 343 (1983), a similar case recently decided by the Board, the Board held that where, pursuant to 43 CFR 3112.4-1,

BLM sends notice by certified mail to a simultaneous oil and gas lease applicant at her record address that she must execute and return the enclosed lease form with the required stipulations and rental, and the notice is returned to BLM marked "Unclaimed" by the Postal Service, and where nondelivery did not occur as a result of the negligence of the Postal Service, the applicant is considered to have been served at the time of return to BLM by the Postal Service of the undelivered certified letter, such constructive service being equivalent in legal effect to actual service of the notice. In Dawursk, supra, the Board also sent an inquiry to the Postal Service regarding the circumstances surrounding the attempted delivery of the envelope. The Postal Service there verified that attempted delivery was made on two specific required dates and the Board concluded that the Postal Service was not negligent in its attempt to deliver the envelope. In the Dawursk decision, appellant received constructive notice of BLM's request for rental payment.

In the present case the Postal Service noted on the stub that the first notice of delivery was left on May 31, 1982. The space on the delivery stub for the second notice of delivery date was blank. However, the Postal Service had the certified letter in its possession for more than the 15-day period required by the DMM because the Postal Service returned the letter to BLM on June 18, 1982, and BLM received it on June 24, 1982. The reply from the postmaster stated he assumed the proper procedure on the second delivery notice was followed and that it was possible the second delivery notice was issued and the date was not indicated on the "mailing piece" (stub). In these circumstances we find that it is not established that the Postal Service was negligent in transmitting the BLM notice. We accordingly find that appellant was constructively served with the BLM notice stating the first year's rental was due. As he did not pay the rental within the required 30 days from such notice, BLM correctly rejected his simultaneous oil and gas lease application M 53834.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Anne Poindexter Lewis
Administrative Judge

We concur:

Bruce R. Harris
Administrative Judge

Edward W. Stuebing
Administrative Judge

